

CR15-00707-PHX-SRB JURY TRIAL-DAY #17 3-15-16

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,)
)
 plaintiff.) **APPEAL**
) **CR15-00707-PHX-SRB**
 vs.) Phoenix, Arizona
) March 15, 2016
Abdul Malik Abdul Kareem,) 9:28 a.m.
)
 Defendant.)
)
_____)

BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE
REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 17
(Pages 2900 through 2915, Inclusive.)

APPEARANCES:

For the Government:

U.S. ATTORNEY'S OFFICE
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For the Defendant Abdul Malik Abdul Kareem:

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Proceedings Reported by Stenographic Court Reporter
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P R O C E E D I N G S

(Called to the order of court at 9:28 a.m.)

(Open court, no jury present.)

(All counsel appearing telephonically.)

THE COURT: Good morning.

Who is on the line for the government?

Mr. Koehler?

MR. KOEHLER: Joe Koehler.

MS. BROOK: And Kristen Brook.

THE COURT: And for the defendant?

MR. MAYNARD: Dan Maynard.

THE COURT: Okay. The question is:

"Count 2 clarification: Is it required that we find both "firearm and ammunition" or is just one sufficient for guilt? Either firearm or ammunition?"

This would be referring to page 19 of the instructions.

I believe that the answer is that for the -- that they can find transportation of either firearms or ammunition, but the jury must be unanimous as to which it was.

MR. KOEHLER: On behalf of the government, that's fine, Your Honor.

MR. MAYNARD: Judge, that's not what the instruction says.

THE COURT: I know that's not what the instruction

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1 says.

2 But I think we had this discussion earlier that
3 perhaps the instruction should have said "firearms and/or
4 ammunition" but it doesn't. It says "firearms and
5 ammunition."

6 I think that the discussion that we had was in
7 connection with a different count, but the idea that the
8 government can charge in the conjunctive but only have to
9 prove in the disjunctive.

10 MR. MAYNARD: Well, I certainly remember us having
11 that discussion on another issue, but not on this one, so.

12 THE COURT: It had to do with the -- I believe with
13 the possession of the two handguns that are charged in Count
14 4.

15 MR. MAYNARD: I think that's right.

16 Judge, I would have to go back and look at the
17 instruction. I think the way this instruction is is the way
18 that the model instruction read.

19 THE COURT: Well, let me take a look at it right
20 here.

21 Okay. I'm going to look at "transporting or
22 shipping."

23 Well, the way the instruction reads is that it has
24 parentheticals.

25 I'm looking at: Shipment or transportation by person

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1 under indictment for felony.

2 I haven't found the one that's for "with the intent
3 to commit a felony."

4 MR. KOEHLER: I don't think there is a model for
5 924(b).

6 THE COURT: I'm sorry? I can't hear you, Mr.
7 Koehler.

8 MR. KOEHLER: We do not believe that there is a model
9 instruction for 924(b).

10 THE COURT: Well, let me tell you on the instruction
11 for shipment or transportation by a person under indictment
12 for a felony. It basically says:

13 The defendant is charged with shipping -- in
14 parentheticals -- transporting -- in parentheticals -- so you
15 pick one or the other -- a firearm -- in parentheticals --
16 ammunition -- in parentheticals.

17 And so it's basically a choice among "shipping" or
18 "transporting" or "firearm and/or ammunition."

19 That's how the instruction reads. So if both were
20 charged, it would be "or."

21 So what do you want to do, Mr. Maynard? How do you
22 want to answer the question?

23 MR. MAYNARD: I want to leave it the way it is.

24 THE COURT: Mr. Koehler?

25 MR. KOEHLER: We believe that the word should

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1 be "or" -- (unintelligible)

2 THE COURT: Okay. We're having a hard time hearing
3 you, Mr. Koehler. It's just garbled.

4 MR. KOEHLER: I'm sorry. It should be "either/or" as
5 long as the jury is unanimous. One or both. But they have to
6 be unanimous as to which one.

7 THE COURT: I agree and I'm going to provide that
8 answer to the jury.

9 Now, this raises an issue.

10 If Mr. Maynard is right, perhaps we could avoid any
11 error by modifying the verdict form to have the jury tell us
12 if they found firearms and ammunition like we did with the two
13 handguns.

14 Apparently, we lost, Mr. Maynard.

15 **(Telephonic connection interrupted.)**

16 MR. KOEHLER: On behalf of the government, we would
17 object to that, but let's get Mr. Maynard back on the line
18 first.

19 THE COURT: Well, let me do this. I'm going to go
20 draft an answer while we get Mr. Maynard back on the line,
21 because apparently, we have to start the conferencing over
22 again. So we'll call you back in a few minutes.

23 MR. KOEHLER: Okay.

24 (Brief interruption)

25 MR. MAYNARD: Dan Maynard.

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1 THE COURT: Mr. Maynard, when did we lose you?

2 MR. MAYNARD: When you said:

3 "Mr. Koehler, what's your position?"

4 THE COURT: Oh. Well, I was wondering why I came up
5 with a great solution after we lost you and you didn't have an
6 ability to tell -- here is what I have written down.

7 So basically, when I said to Mr. Koehler, what is his
8 position, he agreed that it should be "or" and I agreed that
9 it should be "or."

10 But I suggested that to avoid -- I said that if you
11 were right and to prevent any reversible error, we could
12 modify the verdict form so that we know if the jury
13 unanimously finds either or both.

14 Because if they found both, then even if I'm wrong
15 and you're right, it wouldn't matter.

16 So here's what I propose to tell the jury:

17 "You may find either firearms or ammunition or both.
18 If you find either firearms or ammunition but not both, the
19 jury must be unanimous as to which it found."

20 I will give you a new verdict form for Count 2 to
21 make this clear.

22 And what I propose to do on Count 3 -- on Count 2
23 rather -- is to modify the verdict form similarly to the way
24 the verdict form is on Count 3 where it says:

25 "If guilty, we unanimously find that the false

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1 statement was --"

2 And then they have to check off which among the four
3 or whether they found them all or just some of them or just
4 one of them.

5 So I could modify the verdict form to say:

6 "If guilty, We, the Jury, unanimously find that the
7 defendant aided and abetted the transportation of firearms."

8 And then for them to check.

9 I don't want to draft in my head, but you know what
10 I'm saying?

11 MR. MAYNARD: Right. I do. I understand.

12 THE COURT: So that's my proposal to mitigate that
13 slim possibility that I'm wrong.

14 MR. KOEHLER: On behalf of the government, we concur,
15 Your Honor.

16 MR. MAYNARD: That works for the defense.

17 THE COURT: Okay. We will -- I'll prepare that
18 written answer, modify the verdict form -- oh, we'll fax you
19 the modified verdict form so you can see it before I give it
20 to the jury, but the answer will be as I just read it.

21 Okay? Thank you.

22 MR. KOEHLER: That works.

23 MR. MAYNARD: Thank you.

24 MS. BROOK: Thank you, Your Honor.

25 (Proceedings recessed at 9:44 a.m.)

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* * *

(Called to the order of court at 10:02 a.m.)

(Open court, no jury present.)

(All counsel appearing telephonically.)

THE CLERK: Court is now in session.

THE COURT: Okay. Mr. Koehler?

MR. KOEHLER: Yes.

THE COURT: Ms. Brook?

MS. BROOK: Yes.

THE COURT: And, Mr. Maynard?

MR. MAYNARD: Yes.

THE COURT: All right. Do you have the verdict form?

MR. MAYNARD: Yes.

MR. KOEHLER: Yes.

MS. BROOK: Yes.

THE COURT: I wanted to point out that there is a change that's not obvious.

The original verdict form said "as charged in Count 2 of the indictment of aiding and abetting the transportation of firearms in interstate commerce."

And it didn't say "and ammunition."

I think it's because the title in the Indictment didn't have the word "ammunition." But I thought for clarity, that would be a good idea to add that in. Plus, it's in Count 1, the conspiracy count.

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1 So I want -- in case that one was not obvious. And
2 then I added this language of:

3 "If you find the defendant guilty, we find that he
4 aided and abetted the transportation of" -- and the two lines
5 to check.

6 Is this new verdict form agreeable, Mr. Koehler?

7 MR. KOEHLER: It is for the government, Your Honor.

8 THE COURT: Mr. Maynard?

9 MR. MAYNARD: Yes.

10 THE COURT: Thank you.

11 Now, the second question we should have expected
12 after we got the first question and I'm going to suggest that
13 the answer to this question is:

14 "Count 1 can also be 'either/or both firearms and
15 ammunition.'"

16 When I originally typed up this answer, I added "and
17 you must be unanimous if you find either firearms or
18 ammunition but not both," but I don't think that's true
19 because he was -- it's a conspiracy. It's not --

20 MR. KOEHLER: We would agree, Your Honor.

21 THE COURT: It's not the transportation. It's the
22 conspiracy. And it really doesn't matter whether the
23 conspiracy was to transport --

24 It's the conspiracy to transport one of these things
25 in interstate commerce with the intent to commit a felony.

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1 But I'll defer to what counsel want me to say.

2 Mr. Maynard?

3 MR. MAYNARD: They obviously didn't listen to me. I
4 told them to focus on the second so much and not on the first.

5 THE COURT: You know, I think --

6 MR. MAYNARD: I think you're right.

7 THE COURT: I think they're just getting organized.

8 And we had all of those other counts where we have the
9 "and/or" and the "and/or" and we don't in this.

10 So I'm not sure this is indicative of anything but
11 they're trying to actually get what they're asking for, which
12 is clarification.

13 MR. MAYNARD: Yes. I think you're absolutely right.

14 THE COURT: So do you want me to give the sentence:

15 "Count 1 can also be either or both firearms and
16 ammunition" or do you want me to give the second half of the
17 sentence "and you must be unanimous if you find either
18 firearms or ammunition, but not both"?

19 I think it's just the first part.

20 MR. MAYNARD: I think you're right.

21 THE COURT: Just the first part?

22 MR. MAYNARD: Yeah. I do.

23 MR. KOEHLER: We agree, Your Honor.

24 THE COURT: Okay. And I'm not going to give them any
25 different verdict form for Count 1.

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1 Okay. So I'm going to just give them the simple
2 answer:

3 "Count 1 can also be either/or both firearms or
4 ammunition."

5 Period. Thank you very much. I'm sure we will be
6 talking again soon.

7 MR. MAYNARD: Thank you.

8 MR. KOEHLER: Thank you, Your Honor.

9 MS. BROOK: Thank you.

10 (Proceedings recessed at 10:07 a.m.)

11 * * *

12 (Called to the order of court at 11:08 a.m.)

13 (Open court, no jury present.)

14 (All counsel appearing telephonically.)

15 THE CLERK: Court is now in session.

16 THE COURT: Mr. Koehler?

17 MR. KOEHLER: Yes.

18 THE COURT: Ms. Brook?

19 MS. BROOK: Yes.

20 THE COURT: Mr. Maynard?

21 MR. MAYNARD: Yes.

22 THE COURT: Do each of you have a copy of the
23 question relating to Count 3?

24 MR. MAYNARD: Yes. This is Dan Maynard.

25 MR. KOEHLER: Yes. (unintelligible)

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1 THE COURT: I'm sorry. Mr. Koehler, you said "yes"
2 and something else?

3 MR. KOEHLER: Yes.

4 THE COURT: Okay. I didn't catch what else you said.

5 MR. KOEHLER: I said that I have it.

6 THE COURT: I have read it over a couple of times.
7 I'm not exactly sure what it's asking, but here is what I
8 propose the answer to be based on my interpretation of the
9 question:

10 "The government accuses the defendant of making four
11 false statements when he was interviewed by Agent Whitson and
12 Detective Nash on May 5, 2015, at the FBI office in Phoenix.
13 The government is required to prove the three elements stated
14 on page 23 of the instructions beyond a reasonable doubt. The
15 four alleged false statements are listed in the instruction
16 because the government must prove at least one of these as
17 part of the first element. They are also listed on the
18 verdict form because you must agree unanimously on any false
19 statement you find was made."

20 MR. KOEHLER: We agree with that instruction.

21 MR. MAYNARD: Defense agrees.

22 THE COURT: Thank you. That was easy.

23 I'm sure we will be talking again later.

24 MS. BROOK: Thank you, Your Honor.

25 MR. MAYNARD: Thank you, Judge.

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1 (Proceedings recessed at 11:19 a.m.)

2 * * *

3 (Called to the order of court at 3:47 p.m.)

4 (Open court, jury only present.)

5 THE COURT: Good afternoon, ladies and gentlemen.

6 Please sit down. The record will show the presence of the

7 jury. Counsel and the defendant are not present.

8 Who is the presiding juror?

9 JUROR NO. 15: Juror No. 15.

10 THE COURT: Thank you.

11 Juror No. 15, I understand that the jury wishes to

12 adjourn for the day and to resume deliberations tomorrow

13 morning; is that correct?

14 JUROR NO. 15: That is correct.

15 THE COURT: Nine o'clock?

16 JUROR NO. 15: Yes, ma'am.

17 THE COURT: I want to remind you, again, of the

18 admonition not to discuss the case with anyone else. Do not

19 let anyone know anything concerning the status of your

20 deliberations.

21 When you return tomorrow to continue deliberations,

22 please do not begin deliberating until all 12 of you are

23 present in the jury room.

24 On the evening recess, please continue to keep an

25 open mind about the case and continue deliberations when you

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1 return tomorrow.

2 I did want to let you know about something that we
3 were advised about by e-mail earlier today.

4 At the Phoenix Convention Center today there's a
5 Bernie Sanders rally. The Convention Center doors opened
6 earlier this afternoon at noon or one o'clock and his
7 appearance is supposed to be at six o'clock tonight.

8 So they have been telling court staff, you know, you
9 may not want to drive past the Convention Center if you can
10 avoid doing so because some of the streets might be closed
11 because there may be some, you know, people there in the
12 streets and the like.

13 So if you can leave the courthouse and avoid that
14 area, that might be the easiest way to navigate your way back
15 home. We will see you tomorrow morning, ladies and gentlemen,
16 at 9:00 a.m.

17 (Proceedings adjourned at 3:49 p.m.)

18 * * *

19

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21

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C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 1st day of August, 2016.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE, RDR, CRR, CPE